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No. 882

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

LOUIS GUIDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Certiorari to the United States Court of Appeals
for the Seventh Circuit

Reply Brief for Petitioner

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May It Please The Court:

In view of the nature of the respondent's presentation, we deem it appropriate that recurrence be had to the issues between the parties. The "questions presented" by the government are phrased differently from that posed by the petitioner.

THE EVIDENCE

Respondent's presentation of the evidence is inaccurate in material aspects; and we are compelled to call these errors to the attention of the Court. The same erroneous suggestions by the government in its brief to the Appellate Court impelled the opinion by the appeals court in setting out "facts" which do not exist. For example, in the government's brief filed in the Court of Appeals, it stated flatly that, ". . . Micele left $1100 for Louis Guido" at the Club LeFemme (Gov't. Br. in Court of Appeals, p. 16). The Court of Appeals so found stating, ". . . and later Micele left money at a night club for Guido." (Opinion, App. p. 2). We pointed out in our brief that the government witness, Milazzo stated that Micele left $1100 at the Club LeFemme for "Louis" (Petition, p. 9). We further pointed out that Milazzo testified he did not know *for which "Louis" the money was left* there were three such persons at the Club LeFemme named "Louis" (Petition, p. 12; A. 67; Original Record p. 406).

Again, the brief for the government in this court states, "Shortly thereafter, Micele and Milazzo drove to the Club LeFemme because Micele 'had to bring some money to the Club.' (R. 46). When 'Lou [Guido] wasn't there.' (R. 46). Micele said he would leave the money ($1125) for him (R. 46-47, 67)." The reference to $1125 is in the record—that is why the government's reference to that sum of money is in PARENTHESIS. *But Guido's name is nowhere mentioned in the record by Milazzo as having received* $1125—and so the government puts BRACKETS around his name to indicate to your Honors that there is no reference to Guido in this connection in the record. Yet, the twisting of the testimony of Milazzo is such that the government argues that Guido was not there. Neither were

two other "Lou's" about whom Milazzo testified. Milazzo testified that he did know for which "Louis", Miccle had left the money because, as Milazzo testified, Miccle did not say for whom he left the money. *Miccle did not mention any last name* (A. 67).

The government also asserts (its Brief, p. 5) that, "In late October, at the Club, Le Femme, Guido asked Milazzo whether Miccle had told him that Guido and Miccle were partners (R. 47, 66)." This statement misreads the record. The record is as follows: Milazzo is testifying (Abstract 47; Original Record of Proceedings, 272). "He (Guido) asked if Alex (Miccle) had discussed with me (Milazzo), told me (Milazzo), about us (Milazzo and Miccle) being partners. I told him no, Alex didn't say anything to me, and I walked off."

The pronoun references are unmistakable. Milazzo's testimony cannot be interpreted to mean that Guido indicated that Miccle and Guido were partners; but only an inquiry by Guido to Miccle as to whether Miccle said anything to Milazzo about Milazzo and Miccle being partners. So that there could be no question about the references to the parties, Milazzo was asked on cross examination as follows:

> "Q. At one point in your direct examination you stated that Louis Guido stated to you at the Club Le Femme some time in October, 1960, he asked you if you had discussed something with Alex about being partners with him, with Alex; is that right?
>
> A. (by Milazzo) That is correct." (A. 65-66; Original Record of Proceedings, 400).

But such is the thinness of the government's case that it is necessary to misinterpret the record in order to throw even a shadow of suspicion against petitioner.

The government correctly advises the court that "... The trio (Milazzo, Micele and Pellegrini) drove to the apartment building at 732 Bittersweet Place where Guido lived (R. 50, 94). Milazzo was arrested in the building lobby (R. 50)". (Gov't. Br. p. 6). But the government does not point out, as we do, that there were 102 apartments in that building (A. 94). There was no testimony by Milazzo or by any witness, who they were going to see to return "bad" narcotics.

1.

The record contains no evidence to support a finding of conspiracy on the part of the petitioner.

The government asserts that "the sufficiency of the evidence is not a matter warranting review by this court." (Its Brief, p. 10). In two recent cases, *Thompson* v. *Louisville*, 362 U.S. 199, 4 L.Ed. 2d 654, 80 S.Ct. 624, 80 ALR 2d 1355 and *Garner* v. *Louisiana*, 368 U.S. 157, 7 L.ed. 2d 207, 82 S.Ct. 248, this Court determined that a conviction based on a record which contains no evidence to support the finding is a constitutional violation of petitioner's rights. Although we believe we demonstrated the complete lack of evidence in our argument in our petition in chief (pp. 24-32) we would like to summarize the only existing evidence, such as it is, against petitioner Guido.

Fact 1. Government witness Milazzo happened to meet Guido at the Club LeFemme in July, 1960. Milazzo just got out of the penitentiary (A. 38). As he left the tavern Guido walked Milazzo and Micele to the door and said, "Let's get Frankie (Milazzo) back in action" (A. 41). No one replied: *and there was no interpretation of what "action" meant.*

Fact 2. In October, 1960, Milazzo happened to meet Guido at the Club LeFemme without prearrangement.

Guido remarked that Alex (Miccle) and Hooks (D'Agostino) owed him $1800 (A. 45). (Earlier in Milazzo's testimony he said that he met Miccle and D'Agostino in July, 1960 and talked with them about narcotics (A. 38).

Fact 3. Some time in the middle of October, Miccle went to the Club LeFemme with Milazzo and remarked to Milazzo that he was bringing money to the Club. Miccle remarked that "Lou" wasn't there and said he would leave the money. Miccle left $1125 for "Louis" (A. 46). (There was testimony by Milazzo that he did not know whether or not the money was left for Louis Guido or whether it was left for one of two other "Lou's" who frequented the Club LeFemme (A. 67).

Fact 4. In late October, 1960, Milazzo saw Guido at the Club LeFemme and Guido asked if Alex Miccle had discussed with Milazzo about Milazzo and Miccle being partners (A. 47, 66). (Nothing was said by any witness as to what Miccle and Milazzo were to be "partners" in. There was an offer of proof by petitioner that the partnership referred to might refer to a partnership in burglaries, as Miccle and Milazzo were convicted together for burglary offenses (A. 65).

Fact 5. On November 11, 1960 Milazzo, Miccle and Pellegrini drove to an apartment house where Guido lived in one of the 100 apartments. Miccle was supposed to return to some one (name never mentioned in the record) some narcotics about which customers made complaints (A. 50).

Fact 6. In November 1961 (over a year later) Vasselli visited Guido's apartment and talked with Guido in the bedroom (A. 95). (There was no testimony regarding the subject matter of the talks between Louis Guido and Louis Vasselli).

Fact 7. Mrs. Pat Guido, wife of Nick Guido, brother of petitioner, testified that in the first week of November, 1961, she saw Louis Guido give her husband Nick Guido small money in exchange for large bills (A. 95).

Fact 8. Mrs. Pat Guido also testified that around April 20 or 21, 1962, "Louis Guido told my husband, Nick Guido, to be fair with Louis Vasselli because Louis Vasselli was one person that could cause him, Louis Guido, a lot of trouble. Nick Guido told his brother, Louis Guido, that he made all the money with him in the narcotics racket, so he should be responsible for and take care of Louis Vasselli" (A. 95).

Such is the entirety of the evidence touching upon the petitioner directly.

The government concludes that Guido was one of the "higher-ups". It does not advise this court what evidence justifies this unwarranted inference. The government suggests to your Honors that petitioner, "by his own statement" was a partner with Miele and Vasselli. (Its Brief p. 10). *It does not, however, because it cannot, point to any reference in the record where petitioner himself made any such statement.*

We reiterate, "An accumulation of nothings is still nothing" *Reiss* v. *United States*, 324 F.2d 680, 685, 1 Cir. (1963). "Conspiracy cannot be established by mere 'inferences no more valid than others equally supported by reason and experience' *United States* v. *Bufalino*, 2 Cir. 1960, 285 F.2d 408, 419," *Reiss*, 685.

2.

If anything were shown at all, separate conspiracies were shown.

Taking the government's case at its best, and believing everything that all government-witnesses testified to, there is no proof of Guido's participation in a conspiracy with co-defendant Sacko and McGarry. The government asserts that the conspiracy was essentially "unitary". (Its Brief, p. 11) but it does not advise the Court of the details of the unitary connection.

The Court of Appeals failed to apply the rule in *Kotteakos* v. *United States*, 328 U.S. 50.

3.

Under the circumstances of this case where the government relied chiefly on the testimony of an eight-times convicted felon, petitioner was entitled to an instruction that the testimony of a felon is to be received with great care and caution.

As we pointed out, the trial court gave an accomplice instruction to the effect that his testimony should be received with caution and weighed with great care. There was no quarrel with that instruction as such. However, we requested of the trial court an instruction suggested by *Crawford* v. *United States*, 212 U.S. 183, 204. And that is that "... where an accomplice is also an admitted felon, you must treat the testimony with even greater suspicion and you must act upon it with even greater hesitation." (A. 130, 141). The trial court did not give *any instruction*, although requested, with respect to how the jury should treat the testimony of one who had previously been convicted of a felony—let alone convicted eight times.

It is of this failure that we complained; and not of the particular accomplice instruction given.

In *Delaney v. United States*, 77 F.2d 916, 917 the Third Circuit reversed because the trial court refused to instruct the jury, as requested by defendant, "* * * that, in determining the credibility of the (government) witness, it take into consideration the fact that he had previously pleaded guilty to the commission of a crime."

The government omits any comment on why the failure to give such a requested instruction was not error.

4.

It was error for the trial court to rehabilitate the government's chief witness by striking his answer that his testimony before the grand jury on the first occasion of his appearance was different from his testimony at the trial.

Petitioner argued (his Brief, pp. 38-40) that the trial court was in error in striking the government witness Milazzo's testimony to the effect that when he first appeared before the grand jury he denied his participation in any of these (narcotic) activities. There was no legal justification for the court's action.

Nowhere in the government's brief does it discuss this claimed reason for the grant of certiorari.

5.

The grand jury minutes should have been made available to the petitioner.

Where the chief government witness Milazzo testified he gave trial testimony inconsistent with his grand jury testimony (A. 51), where he admitted that upon first interrogation he lied to agents of the FBI (A. 51; Original Record of Proceedings 320), a "particularized need" was demonstrated for the production of the grand jury minutes.

After oral argument, the Court of Appeals required the trial judge to read the grand jury minutes and certify to the Appeals Court its opinion regarding the existence of any material inconsistency (Opinion, App. 7).

Your Honors should grant the writ in order to determine whether or not, under circumstances as demonstrated here, defense counsel should be permitted access to the grand jury minutes for the purpose of cross-examination. Your Honors should advise under what circumstances a defendant is entitled to use grand jury minutes for purposes of cross-examination. The District of Columbia suggested such permissible use in *Gordon* v. *United States*, 299 F. 2d 117, 118.

6.

The prosecutor's closing argument offended essential fairness.

The chief government witness Milazzo testified he told a different story to the grand jury on the first occasion of his appearance than at the trial (A. 51). Upon motion of the government, the trial judge struck the answer and told the jury to disregard it (A. 51).

In arguing the case to the jury, the prosecutor told the jury that Milazzo told the truth before the grand jury (A. 132). Defense objections to the unwarranted statement were overruled.

The government now asserts that the prosecutor's remarks were invited by defense argument; and that because defense counsel told the jury that Milazzo "lied [to the FBI] may he not lie now for whatever purposes he has?" But it was *in* the record that Milazzo lied to the FBI (A. 51). Milazzo testified that two FBI agents inter-

viewed him at the penitentiary and asked him questions regarding the events of his testimony, and he denied participation in any of these events (A. 51). Milazzo was asked if he lied to the FBI and he replied that he did (A. 51; Original Record of Proceedings, 329).

There was, however, *nothing in the record* from which the prosecutor could argue that Milazzo told the truth before the grand jury. To the contrary, there was in the record (although stricken by the judge without legal authority) Milazzo's testimony that he told a different story on the first date of his appearance before the grand jury than his trial testimony (A. 51).

We respectfully submit that no argument of any defense counsel invited the prosecutor to use the high office of United States Attorney to advise the jury that Milazzo told the truth before the grand jury—especially in the face of Milazzo's testimony to the contrary.

7.

Petitioner was limited in his right to cross-examine.

Petitioner was prevented from finding out, via cross-examination, what the "partnership" was about that Guido was alleged to have mentioned. The government argued Guido mentioned to Milazzo something about a partnership in narcotics activity. Defense was foreclosed from arguing, because defense was prevented from cross-examining, that "partnership" meant partnership in burglaries, in which Milazzo and Miccle had previously been convicted together.

With respect to Mrs. Pat Guido and the limitation of examination with regard to money which Mrs. Pat Guido said Louis Guido exchanged with her husband Nick Guido,

the government states that the questions about the money ". . . had nothing to do with the issues in this case." (Gov't. Br. p. 17).

Yet, in its case in chief, the government had Mrs. Pat Guido testify that in November, 1961, Louis Guido exchanged small bills with brother Nick Guido for large bills (A. 95; Original Record of Proceedings, 813). The government even argues in this Court that a "fact" to be taken into consideration in determining that there was sufficient evidence against Louis Guido is that "on one occasion in November, Louis Guido gave to his brother Nick Guido paper money in small denominations for $100 bills" (Gov't. Br. p. 8). *Yet, the government argues on page 17 of the same Brief that the questions regarding the money "had nothing to do with the issues in this case"!*

The purpose of cross examination is obvious: to test the witness, to make her retrench, to obtain details regarding the transaction in order to demonstrate possible falsity. To a whole series of questions regarding the money, the court sustained the government's objections (A. 108).

The limitations on the cross examination of Milazzo and of Mrs. Pat Guido denied petitioner a fair trial.

8.

The request for a bill of particulars should have been granted.

It is not clear from any decision in this Court when the denial of a bill of particulars is proper and when such denial affects the substantial rights of the defendant.

9.

Petitioner was not granted the right to review of his claimed error that the court instructed the jury improperly on an essential element of the crime.

We presented the argument on the above point at pp. 50 to 53 of our Brief.

The government nowhere answers this contention; except perhaps to state that because heroin was a substance which could not be legally imported that "... knowledge of illegal importation on Guido's part is a reasonable inference even without the aid of the presumption." (Gov't. Br. 11-12).

As no evidence was produced that Guido participated in any narcotic transaction, and as the court did not instruct the jury properly on the essential element of the crime, the government nowhere meets this contention in its Brief.

10.

The inflammatory headlines regarding "Guido" prejudiced petitioner in his right to a fair trial.

In our presentation on this point, pp. 53-59, we stated that the trial judge repeatedly admonished the jury not to read newspapers, watch television or listen to the radio.

We pointed out, however, that on the day before the case went to the jury, screaming headlines in all four of the

metropolitan Chicago newspapers proclaimed in large block letters (See Book of Exhibits, pp. 15 to 18) that,

"GUIDO, PAL GET 60 to 100 YEARS"

"TWO TERROR BANDITS GIVEN 60 YEAR TERMS"

"SAME TERM FOR YONDER—YONDER GETS 60-100 YRS, TRIES TO SEIZE COP'S GUN."

Both the Court of Appeals' opinion (App. p. 6) and the government here (Its Brief p. 15) assert that since most of the publicity did not relate to *Louis Guido* that no prejudice could have occurred. *But the only way the jury could know that the headlines did not pertain to the petitioner Louis was to have read the articles in question.*

Your Honors well know that a juror is loathe to raise his hand and advise the court that he did not follow the court's admonishment regarding publicity. The fairer method of interrogation would have been to permit a *voir dire* examination of each juror outside the presence of the others.

CONCLUSION

For the reasons asserted in our original brief, and here we respectfully submit the Petition for the Writ of Certiorari should be granted.

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